No. 89-1289

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES F. CHAPMAN

Petitioner

v.

HOMCO, INC.

Respondent

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

From what date should the two year statute of limitations in the Age Discrimination in Employment Act of 1967 commence to run?

RULE 28.1 STATEMENT

Homco, Inc. is a wholly owned subsidiary of Home Interiors & Gifts, Inc. Other subsidiaries of Home Interiors & Gifts, Inc. are H.I. Service Enterprises, Inc., Dallas Mavericks, Inc., Dallas Woodcraft, Inc., GIA, Inc., H.I. Production Company, Inc., Moody-Day, Inc., Personal Way Aviation, Inc., Service Industries Property Management, Inc., Kosmeo Cosmetics, Inc., and Lady Love Cosmetics, Inc.,

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent, Homco, Inc., respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case.

STATEMENT OF THE CASE

This is an action under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34, in which Chapman alleges that Homco discharged him on January 11, 1986, because of his age. Chapman commenced this action on January 13, 1988, in the United States District for the Northern District of Texas. Chapman did not allege a willful violation of the ADEA.

On December 12, 1988, the District Court issued a Memorandum Opinion and Order which granted Homco's Motion for Summary Judgment and dismissed the case on alternative grounds. The District Court found that Chapman's action was barred by the ADEA's two year statute of limitations, 29 U.S.C. § 626(e)(1),[1] in that he was discharged on January 11, 1986, but had not filed suit until January 13, 1988. Alternatively, the District Court held that Chapman had failed to establish a genuine issue of material fact with respect to his claim of age discrimination.

A unanimous panel of the Fifth Circuit affirmed the District Court's decision in a *per curiam* opinion dated October 23, 1989. The Fifth Circuit stated: "There is no dispute that January 11, 1986, is the date of the termination as well as the date of the last alleged discrimination event" and that "Chapman filed his complaint on January 13, 1988, more than two years after the date that Chapman was notified of his discharge." Based upon these undisputed facts, the Fifth Circuit held that the District Court did not err in finding Chapman's action to be barred by the ADEA's statute of limitations. Because the Fifth Circuit concluded that dismissal of Chapman's claim was proper because it was time barred, the panel did not address the District Court's ruling on the merits of the action.

[1] 29 U.S.C. § 626(e)(1) adopts the statute of limitations set forth in the Portal-to-Portal Act, 29 U.S.C. § 255, which provides that an action "shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

REASONS FOR DENYING WRIT

Chapman's petition appears to present two questions to this Court. Question 1, which is raised in the body of the petition and in the Counterstatement of Question Presented in this Brief, raises the issue of from what date should the ADEA's two year statute of limitations commence to run? The second question is the narrower Question Presented in the petition, and raises the issue of whether a subsequent discriminatory act by the employer after the date of termination of the employee should be the date for the statute of limitations to commence under the ADEA? As set forth below, neither of these questions warrant granting Chapman's petition.

QUESTION 1.

I. This Court has already determined the date upon which the ADEA's statute of limitations begins to run.

Chapman's petition asserts that the Fifth Circuit erred in finding that his cause of action under the ADEA accrued at the time he was notified of his discharge on January 11, 1986, rather than at an unspecified date three weeks later when he first became "aware that the termination was based upon discriminatory factors." Chapman urges that this latter date should control for purposes of commencing the limitations period under the ADEA, since Homco allegedly concealed its discriminatory intent when it notified him on January 11, 1986, that he was discharged.

The question of when the statute of limitations begins to run for purposes of employment discrimination claims, however, has already been answered by this Court. In *Delaware State College v. Ricks,* 449 U.S. 250 (1981), an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et.seq.,* this Court found that in order to determine the timeliness of a plaintiff's claim, a court must "identify precisely the 'unlawful employment practice' of which he complains." *Id.* at 257. This Court noted

that the only discrimination alleged by Ricks was the denial of tenure as a professor and that such discrimination occurred at the time the tenure decision was made and communicated to him. *Id.* at 258. This Court thus held that the limitations period commenced to run when the tenure decision was made and Ricks was so notified. *Id.* at 258-59.

In reaching this finding, this Court rejected the suggestion that the limitations period actually began to run on the date when, as a result of the tenure decision, Ricks was eventually terminated. Since Ricks had complained only of the tenure decision, this Court found that it was "simply insufficient . . to allege", in order to start the limitations period on the later date, that the termination gave "present effect to the past illegal act" or that it "perpetrate[d] the consequences of forbidden discrimination." *Id.* at 259. This Court thus held that the date the tenure decision was communicated to Ricks started the limitations period even though one of the effects of the decision—the evenutal loss of employment—did not occur until later. *Id.*

Although *Ricks* was a Title VII case, its reasoning applies to all employment discrimination actions. This Court has applied the principle of *Ricks* to employment actions under 42 U.S.C. § 1981, *Ricks,* 449 U.S. at 263, and 42 U.S.C. § 1983, *Chardon v. Fernandez,* 454 U.S. 6 (1981). Since Title VII and the ADEA share the common purpose of eliminating discrimination in the workplace, the principle of *Ricks* logically extends to ADEA actions as well.[2] *See Oscar Meyer & Co. v. Evans,* 441 U.S. 750, 757 (1979). It was this similarity which led the Fifth Circuit below to

[2]In *Unexcelled Chemical Corporation v. United States,* 345 U.S. 59, 65 (1953), this Court was asked to determine when a cause of action accrues for purposes of commencing the limitations period under the Portal-to-Portal Act, 29 U.S.C. § 255.1. This Court noted the following: "A cause of action is created when there is a breach of duty owed the plaintiff." There is thus no substantive difference between the starting dates under this statute, as incorporated by 29 U.S.C. § 626(e)(1), and Title VII's limitations period.

regard *Ricks* as dispositive authority in finding that the limitations period under the ADEA began to run on the date Chapman was notified of his discharge. Chapman has not disputed the Fifth Circuit's application of *Ricks* to this action.

Chapman's petition thus asks this Court to address a question already decided by this Court. By urging this Court to hold that the ADEA limitations period began to run for Chapman on the date when he first believed that his discharge was discriminatory, Chapman is asking this court to consider, once again, whether a date other than the actual date that a plaintiff is notified of an alleged discriminatory decision may control for purposes of starting the limitations period. The ruling in *Ricks,* however, is dispositive of this question and, when applied to this case establishes that, contrary to Chapman's position, the limitations period began on the date he was notified that he was discharged. Inasmuch as Chapman has not articulated any reasons why *Ricks* should be reconsidered by this Court, his petition should be denied.

II. The decision below is not in conflict with the law of any other circuit.

Contrary to Chapman's petition, the decision of the Fifth Circuit below in rejecting his argument that the limitations period should have started when he allegedly discovered the discriminatory nature of his discharge is not in conflict with the Ninth Circuit's opinion in *Aronsen v. Crown Zellerbach,* 662 F.2d 584 (9th Cir. 1981), *cert. denied,* 459 U.S. 1200 (1983). A careful reading of *Aronsen* distinguishes it from the facts which were before the Fifth Circuit below.

In *Aronsen,* the Ninth Circuit was not asked to determine when the ADEA's statute of limitations begins to run. Rather, the court was merely asked to determine on what date the alleged discriminatory act occurred. The defendant therein asserted that it informed plaintiff of his discharge on a certain date, but the

plaintiff specifically denied having been informed of his discharge on that date. *Aronsen,* 662 F.2d at 594. Hence, in *Aronsen,* unlike in the present case, the plaintiff raised a fact question as to when he was informed of his discharge. It was this fact question that caused the Ninth Circuit to find summary judgment inappropriate in *Aronsen.*

The Fifth Circuit, in fact, distinguished *Aronsen* on this very ground in the opinion below:

> In that case, as Homco correctly notes, the summary judgment was reversed because a fact question existed as to when the plaintiff was informed of his discharge. In the instant case, no such fact issue remains open.

Since Chapman has not otherwise demonstrated a conflict among the circuits with respect to Question 1, his petition should be denied.

III. Chapman's petition seeks to defeat the purpose of the ADEA's statute of limitations.

This Court has consistently recognized that time limitation provisions promote important interests: "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 463-4 (1975). In construing the limitations period involved in the present case, 29 U.S.C. § 626(e), the Court is thus constrained to uphold its purpose, which is to encourage the prompt presentation of claims. *See Campbell v. Haverhill,* 155 U.S. 610, 617 (1985).

Accepting Chapman's position that the ADEA's limitations period should start only when an employee decides that discrimination was the true reason for his discharge would effectively

defeat this provision. *See United States v. Kubrick,* 444 U.S. 111, 125-6 (1979). Under these circumstances, it is likely that tolling would attach in most cases. As noted in *Thornborough v. Columbus & Greenville Railroad Co.,* 760 F.2d 633, 638 (5th Cir. 1985): "Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to age,' or to inform a dismissed employee candidly that he is too old for the job."

In the vast majority of cases, then, there would be no objective and certain means of determining when the limitations period begins to run. It might be years before a person may come to believe that an adverse employment related decision affecting the person was caused by illegal discrimination. More importantly, there would be no incentive for that person to investigate whether or not discrimination played any role in an adverse employment decision. In the meantime, the employer would remain vulnerable to suits based on these old acts. Since the foregoing result is plainly contrary to the purpose of 29 U.S.C. § 626(e), Chapman's petition should be denied.

QUESTION 2.

Neither the decision below nor the underlying record raises the Question Presented in the petition.

Chapman's petition asserts, for the first time in this proceeding, that Homco "continued the illegal act of discriminatory termination by falsely stating in its Memorandum to its other employees" on January 13, 1986, that he "had resigned his position." Chapman asserts that the statute of limitations therefore began to run on January 13, 1986, and not on January 11, 1986, the date he was notified of his discharge.

Neither the District Court nor the Fifth Circuit, however, addressed this assertion. The District Court, in its Memorandum Opinion and Order, noted only that Chapman's action arose from

his "discharge from employment on January 11, 1986", and did not mention any "subsequent discriminatory acts." Indeed, no such post discharge discriminatory acts were alleged in Chapman's Complaint or in his Response in Opposition to Homco's Motion for Summary Judgment.

The Fifth Circuit likewise addressed only the question of whether Chapman's termination claim was timely. In fact, as previously noted, the panel stated: "There is no dispute that January 11, 1986, is the date of the termination *as well as the date of the last alleged discrimination event.* [emphasis added]." The Fifth Circuit's finding on this point thus fully addressed the statute of limitations issues raised in Chapman's appellate brief.

In short, Chapman's petition plainly presents a question heretofore not raised in this proceeding or otherwise factually developed in the record. Inasmuch as this Court has routinely refused to consider issues raised for the first time on appeal or certiorari, *see E.E.O.C. v. Federal Labor Relations Authority,* 476 U.S. 19 (1986); *Delta Air Lines, Inc. v. August,* 450 U.S. 346 (1981); *Tennessee v. Dunlop,* 426 U.S. 312 (1976), writ should be denied to Chapman on this question.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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